IV. THE IMPOSITION OF ACCESS REQUIREMENTS ON CABLE MODEM SERVICE WOULD BE CONTRARY TO THE PUBLIC INTEREST.

A. The Imposition Of Access Requirements Would Be Contrary To Congressional Goals And The Commission's Stated Policy Objectives In This Proceeding.

In identifying its policy objectives in this proceeding, the Commission recognized that its primary obligations are "to 'encourage the ubiquitous availability of broadband to all Americans'" and "to encourage facilities-based broadband competition," while "minimiz[ing] both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation in a competitive market."[64] Mandated access to the cable modem platform would be contrary to every one of these objectives. Furthermore, mandated access could easily undermine the dependability of cable modem service, and maintaining dependable service is far more important to consumers' interests than any benefits that might be achieved through an access requirement.

Cable operators have led the communications industry in making residential broadband services available to consumers across the country. Cable operators made the tremendous investments in technology and system upgrades necessary to transform their cable plant from the one-way delivery of analog video services to the two-way delivery of digital video, voice and high-speed data services. Cable operators continue to innovate and invest today, as they build and upgrade new infrastructure, including investing in backbone and other facilities to become completely self-reliant in the provision of cable modem service following the collapse of Excite@Home. Indeed, Cox alone will have spent approximately $150 million in capital costs and operating expenses as of June 30, 2002 simply to transition all cable modem service

[64] *Id.* at ¶ 73.

customers from Excite@Home to its own self-managed network, thereby greatly enhancing the reliability and functionality of its high-speed Internet services.

Mandated access to the cable modem platform would discourage such forward-looking investments and innovations, both today and in the future. The specter of increased regulation, which always has a dampening effect on investment in new services, would be particularly unnerving in this case because the practical difficulties of devising a mandated access regime would leave the regulatory landscape unclear for many years.[65] Moreover, the threat of regulation and resultant uncertainty would deter other providers from making the tremendous risk investments necessary to develop and deploy broadband services. Some providers who otherwise would make investments in broadband facilities may instead take advantage of mandated access to the cable modem platform. To the extent that mandated access may weaken cable operators' broadband investment and deployment, ILECs also may have less incentive to make their high-speed services available more broadly or to price them so as to compete aggressively against cable operators' offerings. Rather than spurring investment in additional broadband facilities, therefore, an access requirement would impede investment and innovation – contrary to the Commission's express policy objectives in this proceeding.[66]

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[65] For instance, it has been more than six years since the 1996 Act's adoption, and significant elements of the Commission's rules to implement that statute continue to remain in doubt. *See, e.g., USTA v. FCC*, slip op. (remanding unbundled network element and line sharing rules). *See also* Section III(B), *supra* (describing significant technical and business issues likely to arise in connection with developing a regulatory scheme for mandated access to cable modem service).

[66] *Ruling & Notice*, FCC 01-77 at ¶ 73.

B. Mandated Access Could Undermine The Dependability Of Cable Modem Service.

The Commission also must balance any benefits of mandated access against the potential risks to customers and quality of service. Mandating access would be counterproductive if it would result in disruption of the very service that is being shared. As the Supreme Court recently recognized in *Verizon Communications, Inc. v. FCC,* and as the Commission determined when it adopted its ILEC unbundling rules, access requirements, even when mandated by statute, must give way to the facilities owner's need to maintain "network reliability and security."[67]

Mandated access on the government's timetable would impede the development of technology solutions and business models that best protect the integrity of cable networks and customer service, to consumers' detriment. All of the major cable operators are experimenting with innovative solutions to the technical and business challenges posed by the introduction of additional ISPs on the cable modem platform. Cox's high customer service standards dictate that it resolve all technical issues and develop a business model that ensures dependable service *before* bringing additional ISPs onto its cable networks.

The biggest threat to the public interest in the history of cable modem service has been the collapse of Excite@Home. Over 4 million customers were affected, including over 600,000 Cox cable modem service subscribers. Cox's transition was relatively uneventful for its subscribers only because it paid Excite@Home $160 million to continue service, greatly accelerated existing plans to become self-reliant, and spent millions more to prevent service disruptions and ensure that the transition was as transparent as possible for its customers. Cox's

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[67] *Verizon Communications, Inc. v. FCC,* Nos. 00-511, 00-555, 00-587, 00-590 and 00-602, slip op. at 65 (S. Ct. May 13, 2002) (quoting Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order,* 11 FCC Rcd 15499, 15648).

efforts to ensure customer expectations were met during the transition from Excite@Home necessarily diverted resources from its multiple-ISP trial. However, any short term delay in Cox's trial is more than outweighed by the long term benefits from retaining customers' trust in the cable modem platform through an exceptionally smooth transition. This trust and loyalty will facilitate widespread consumer acceptance of broadband services and the future introduction of additional ISPs on Cox's cable modem platform.

The impact of the Excite@Home collapse has made Cox acutely aware of the need for cable operators to negotiate contract terms that will allow them to maintain control of the cable modem network to assist customers in the event an ISP becomes insolvent or otherwise fails to deliver its service. This is a customer service priority, because customers naturally look to cable operators in the event of any service failure, including problems with ISPs outside the cable operators' control. In addition, even when operators are not responsible for the ISP service failures, customers may seek to hold operators liable for adverse impacts outside of their control.[68]

The failure of Excite@Home and its effects on Cox, other cable operators and cable modem customers provide ample evidence that any change to the existing cable modem platform creates risks and costs that are not easily addressed. Mandated access to the cable modem

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[68] Indeed, largely in response to the Excite@Home collapse, the California legislature is considering a requirement that electronic mail service providers give customers at least 30 days notice prior to termination, unless otherwise permitted by law or service agreement. *See* Press Release of California Senator Debra Bowen, Bowen Bill Aims To Give Rights To Internet Users and Electronic Mail Customers (February 12, 2002), *available at* http://democrats.sen.ca.gov/servlet/gov.ca.senate.democrats.pub.members.memDisplayPress?district=sd28&ID=1211. This poses the threat that, if an ISP on the cable modem system violates this requirement, some customers may seek to hold the cable operator liable for a violation not of its own creation.

platform would greatly increase the risks of service disruption because implementation timetables and resolution of complex operational issues inevitably would be managed by government, rather than market forces. As more and more consumers begin to depend on the Internet not just for e-mail and chat but also for shopping, banking, travel planning, working at home and other functions of their daily lives, the possibility of disruption becomes increasingly unacceptable.

Furthermore, the public interest benefits of such a disruptive process would be limited. Unlike ILECs prior to the 1996 Act, cable modem service providers face healthy and growing competition from a variety of Internet access service providers.[69] As the Commission has observed, to remain competitive, Cox and other cable operators are developing ways to bring additional ISPs to their customers, even in the absence of a government mandate.[70] Cox fully intends to offer multiple ISPs in its major markets by 2003, assuming that ISPs will cooperate in developing the technical solutions and business models necessary to serve consumers and manage the network and investments in a prudent manner.[71] Because market forces already are developing solutions to the questions posed by ISP access to the cable modem platform, any potential consumer welfare benefits of a mandated access regime are highly limited. When these minimal benefits are weighed against the enormous risks to deployment incentives, to innovation and to service reliability, the balance conclusively tips against a mandate for access.

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[69] *See* Section II(A), *supra.*

[70] *Ruling & Notice*, FCC 02-77 at ¶¶ 26, 28, 83.

[71] Cox is conducting an ongoing technical trial in El Dorado, Arkansas with the participation of unaffiliated ISPs AOL Time Warner and Earthlink. Cox also is discussing with a number of ISPs contractual terms and conditions under which such ISPs may be given access to the cable spectrum in a manner that would allow Cox to maintain the integrity of the network and the high-speed and reliable service its customers expect.

V. GOVERNMENT-MANDATED ACCESS OBLIGATIONS WOULD RAISE GRAVE CONSTITUTIONAL CONCERNS.

In addition to being contrary to the Communications Act and the public interest, mandated access to the cable modem platform would violate cable operators' First Amendment rights and would implicate the Fifth Amendment bar on takings.[72]

The integrated Internet service offered by cable operators is entitled to full First Amendment protection.[73] As the Supreme Court has held, any "enforceable right of access" to the facilities or offerings of a fully-protected speaker cannot survive.[74] This is true whether a regulation is content-based (and therefore subject to strict scrutiny) or content-neutral (and therefore subject to intermediate scrutiny).[75] Indeed, the only court to consider the First Amendment implications of mandated access for cable modem service concluded that such obligations would fail both intermediate and strict scrutiny.[76] As that court explained, an access obligation would impinge on the cable operator's "editorial discretion" and "its ability to market and finance its service," while the availability of alternative providers ensured that there was no

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[72] This discussion summarizes the significant constitutional issues raised by an access requirement imposed on cable operators. These issues were discussed in more detail in Cox's *NOI* comments, and that discussion is hereby incorporated by reference. Cox *NOI* Comments at 47-51.

[73] *See Reno v. ACLU*, 521 U.S. 844, 868-70 (1997) (Internet services treated as conventional speakers for purpose of First Amendment analysis); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

[74] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254 (1974) (holding that a Florida statute granting candidates for elected office a right of reply to materials published in newspapers was unconstitutional).

[75] *See United States v. O'Brien*, 391 U.S. 367, 377 (1968) (permitting content-neutral regulation only under limited circumstances).

[76] *Comcast Cablevision of Broward County, Inc. v. Broward County, Florida*, 124 F. Supp. 2d 685 (S.D. Fla. 2000).

government interest sufficient to justify the impact on the cable operator's speech, even under intermediate scrutiny.[77]

Access obligations also would raise significant issues under the Fifth Amendment's prohibition on the taking of private property without just compensation. A permanent physical occupation of private property is a *per se* taking under the Fifth Amendment.[78] An access obligation would require a cable operator to set aside some portion of its plant, either in the form of a dedicated portion of bandwidth or through "sharing" of bandwidth used generally for cable modem service. This allocation of bandwidth would constitute a physical occupation, because it would deprive the cable operator of the ability to use the bandwidth to provide cable modem service or any other service, or even to hold that bandwidth in reserve for expected future uses.[79] Moreover, even if there were no physical occupation of the bandwidth used to provide mandated access, an access obligation would constitute a taking under the *Penn Central* standard, because it would "interfere[] with distinct investment-backed expectations" of cable operators and single out cable operators to bear the burden of a government action that benefits only others.[80] Any attempt to establish "just compensation" for this taking would mire the Commission in the creation and enforcement of complex formulae for rate regulation, with no congressional

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[77] *Id.* at 693. The court also held that there was no compelling interest that would be sufficient to justify an access obligation under strict scrutiny. *Id.* at 696-97.

[78] *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437-38 (1982) (scope of taking does not matter if a physical occupation has occurred). In fact, a "physical occupation" can occur even when there is no change in the ownership of the property. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (taking occurs when navigational servitude is imposed on private lake).

[79] A cable operator's potential ability to expand the bandwidth on its system is irrelevant to this analysis, much as a landowner's ability to purchase other real estate would not affect the conclusion that a taking had occurred.

[80] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

sanction or guidance, only the promise of endless litigation. Consequently, the imposition of access requirements on cable modem service not only lacks any legal or policy basis, but also would be unconstitutional.

VI. THERE IS NO LEGAL BASIS FOR LOCAL REGULATION OF CABLE MODEM SERVICE, AND THE COMMISSION SHOULD PREEMPT SUCH REGULATION BECAUSE IT WOULD BE CONTRARY TO FEDERAL COMMUNICATIONS LAW AND POLICY.

The Commission is entirely correct in its recognition of the need for federal preemption of "State and local regulations that would limit the Commission's ability to achieve its national broadband policy, discourage investment in advanced communications facilities, or create an unpredictable regulatory environment."[81] Congress' decision not to reserve any regulatory authority to state and local governments over Title I interstate information services reflects its concern that such regulation would conflict with the deregulatory national policy that Congress has adopted for this category of services. Moreover, because state and local governments' interests in managing public rights-of-way already are met once a cable operator has obtained and pays for a franchise to construct and operate its cable system, these interests cannot support the imposition of additional franchise, franchise fee, access or other requirements on cable modem service. Accordingly, the Commission should clarify the prohibition on state and local regulation of cable modem service by expressly preempting such regulation, in furtherance of its implementation of national communications policy.

A. State and Local Governments Have No Authority Over Interstate Information Services Such As Cable Modem Service.

As an interstate information service, cable modem service is exempt from state and local regulation. Under the Supremacy Clause of Article VI of the U.S. Constitution, state and local

[81] *Ruling & Notice*, FCC 02-77 at ¶ 99.

authorities may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation.[82] The Communications Act grants the Commission explicit authority over interstate communications to the exclusion of state and local authority, except in limited, enumerated circumstances.[83] It bears noting that, among all the courts that have reviewed local franchising authorities' ("LFAs") attempts to impose access requirements on cable modem service, not one court has found that these entities have the power to impose such regulations.

"Congress' intent, in adopting section 1 of the Act, [was] to centralize authority over interstate and foreign communications in the FCC."[84] As repeatedly recognized by the Commission and the courts:

> Under this regulatory framework, the Commission has plenary and comprehensive jurisdiction over interstate and foreign communications, the regulation of which is entrusted to the Commission. The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority, Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications service may be offered in a state.[85]

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[82] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *See also NY State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 66 (2d Cir. 1982); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) ("*NY State Comm'n on Cable Television*").

[83] *See, e.g.*, 47 U.S.C. §§ 152(a)-(b); The Public Utility Commission of Texas; The Competition Policy Institute, IntelCom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc.; Teleport Communications Group, Inc.; City of Abilene, Texas; Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, *Memorandum Opinion and Order*, 13 FCC Rcd 3460, 3547 (1997), *aff'd sub nom. City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

[84] *Id.*

[85] Operator Services Providers of America, *Memorandum Opinion and Order*, 6 FCC Rcd 4475, 4476-77 (1991) (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1501 (D.C. Cir. 1984)); *see also Telerent Leasing Corp. et al.*, 45 F.C.C.2d 204, 217 (1974), *aff'd sub*

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In those instances where Congress intended to reserve authority to state and local governments, it explicitly stated its intention in specific provisions of the Communications Act. State and local authority over telecommunications services, for instance, is described in Title II of the Act. Section 253(c) reserves to state and local governments the authority to manage common carriers' use of the public rights-of-way and to require compensation for such use, provided that such fees are fair and reasonable and applied on a competitively neutral and nondiscriminatory basis.[86] In addition, Section 2(b) reserves state authority over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."[87] Even under Section 2(b), however, the Commission may preempt state regulation of intrastate telecommunications service when such regulation would impede the exercise of federal authority over interstate communications.[88]

Similarly, Title VI reserves to LFAs limited regulatory authority over cable services, but does not recognize any LFA authority over non-cable services such as cable modem service.

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nom. North Carolina Utils. Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *Orth-O-Vision, Inc.*, 69 F.C.C.2d 657, 666 (1978); *AT&T and the Associated Bell System Cos. Interconnection With Specialized Carriers in Furnishing Interstate Foreign Exchange (FX) Service in Common Control Switching Arrangements (CCSA)*, 56 F.C.C.2d 14, 20 (1975), *aff'd sub nom. California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *Vaigneur v. Western Union Tel. Co.*, 34 F. Supp. 92, 93 (E.D. Tenn. 1940); *AT&T Communications v. Public Service Comm'n*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985); *Chesapeake and Potomac Tel. Co., Memorandum Opinion and Order on Reconsideration*, 2 FCC Rcd 3528 (1987).

[86] 47 U.S.C. § 253(c).

[87] 47 U.S.C. § 152(b). In some cases, state governments have delegated aspects of their authority over intrastate telecommunications services to local governments.

[88] *See e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 275 (1986); *Public Util. Comm'n v. FCC*, 886 F. 2d 1325, 1331 (D.C. Cir. 1989); *California v. FCC*, 905 F.2d 1217, 1244 (9th Cir. 1990).

The *Ruling & Notice* requests comment on whether LFAs have authority under Title VI to prohibit, limit, restrict, or condition the provision of cable modem service (e.g., through the imposition of an additional franchise, franchise fee, access or other requirements).[89] However, the Commission already has answered this question conclusively in the negative in the landmark *Troy Decision*: "The scope of a local government's franchising authority under Title VI does not extend to communications services other than cable service."[90] Not surprisingly, therefore, local authorities themselves have admitted that the classification of cable modem service as anything but a Title VI cable service eliminates their authority under Title VI over this service.[91] The Local Government Coalition stated in their *NOI* reply comments that "[t]he classification of cable modem service as a cable service is not only necessary to preserve the Commission's own Title VI authority over the cable industry, but also the authority of local governments."[92] The Local Government Coalition's assessment is absolutely correct – because cable modem service is not a cable service, it is beyond the scope of Title VI and local governmental authority. The *Troy Decision* and local governments' admissions thus confirm the Commission's tentative conclusion that Title VI does not provide a basis for an LFA to impose an additional franchise, franchise fee or other regulations on a cable operator that provides cable modem service.[93]

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[89] *Ruling & Notice*, FCC 02-77 at ¶¶ 100, 102, 105.

[90] TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e) and 253, *Memorandum Opinion and Order* ("*Troy Decision*"), 12 FCC Rcd 21396, 21422 (1997), *reconsideration denied*, ("*Troy Reconsideration Decision*"), 13 FCC Rcd 16400 (1998).

[91] National Association of Telecommunications Officers and Advisors, *et al.* (the "Local Government Coalition"), *Comments in GN Docket No. 00-185* at 20-22 (filed Dec. 1, 2000); Local Government Coalition, *Reply Comments in GN Docket No. 00-185* at 24-26 (filed Jan 10, 2001).

[92] Local Government Coalition, *Reply Comments in GN Docket No. 00-185* at 26.

[93] *Ruling & Notice*, FCC 02-77 at ¶¶ 102, 105.

Moreover, the Communications Act does not elsewhere reserve any authority for state and local governments over Title I interstate information services such as cable modem service. In the 1996 Act, Congress created the category of "information services" and defined it in Section 3(20). In contrast to Title II and Title VI, however, Congress did not recognize any role for state and local governments in the regulation of these services. The reason is simple: Congress intended that this new category of communications services remain largely unregulated, and that any regulation occur at the federal level pursuant to specific statutory instructions. This regulatory scheme must be honored not only at the state level, but in the case of cable modem service, at the local franchising level as well.

B. State and Local Governments' Management Of Public Rights-Of-Way Do Not Justify Additional Regulation Of Cable Modem Service.

As explained in more detail below, state and local governments' interests in managing public rights-of-way already are met once a cable operator has obtained a franchise to construct and operate the cable system and compensates the LFA for such use through the payment of franchise fees on gross revenues from cable services. Accordingly, state and local authorities cannot rely on their general interest in managing public rights-of-way to regulate cable modem service.

1. LFAs' Interest in Managing Rights-of-Way Usage Is Fully Protected by the Cable Franchise.

The Commission has previously recognized, and Cox does not dispute, that LFAs have a legitimate interest in managing the physical occupancy of public rights-of-way.[94] Despite

[94] LFAs "must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of the streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. ... These maters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements,

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assertions to the contrary by LFAs,[95] the classification of cable modem service as an interstate information service does not deprive the LFAs of their important public rights-of-way management authority. To the contrary, cable operators' existing cable franchises already fully address LFAs' right to manage public rights-of-way and to receive compensation for their use. There accordingly is no basis for imposing additional franchise requirements or franchise fees on cable modem service.

a. LFAs' Interest in the Physical Management of Public Rights-of-Way Usage Is Fully Protected by the Cable Franchise.

As the Commission observed in the *Ruling & Notice*, cable operators provide cable modem service over the facilities of a cable system, and an LFA has the right to require a cable operator to obtain a franchise to construct a cable system over its public rights-of-way.[96] As a franchised cable operator in its service areas, Cox's cable network lawfully occupies public rights-of-way under the authority of its cable franchise agreements. These cable franchise agreements address any and all burdens placed by Cox's network on the public streets regardless of the services provided over the network, thereby fully protecting LFAs' interest in physical management of these rights-of-way.

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establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them." *Troy Decision*, 12 FCC Rcd at 21441.

[95] For example, the Alliance of Local Organizations Against Preemption ("ALOAP") recently stated that the Commission's classification ruling will "remove [local communities'] authority over public rights-of-way." Press Release of ALOAP, Local Government Groups Take FCC to Court Over Cable Modem Ruling, (May 14, 2002), *available at* http://www.nlc.org/nlc_org/site/newsroom/nations_cities_weekly/display.cfm?id=3F6C9B7C-88D3-4857-BE2B71EFA950ED03 ("May 14, 2002 Press Release of ALOAP").

[96] *Ruling & Notice*, FCC 02-77 at ¶¶ 96, 102.

In particular, Cox's cable franchises contain a broad array of requirements that serve to protect public rights-of-way and to provide for their fair and orderly use. These include:

- requirements that the cable operator locate its cable system so as to minimize interference with the proper use of public rights-of-way and with the rights and convenience of adjoining property owners;

- requirements that if, during the course of construction, operation or maintenance of the cable system, there occurs a disturbance of any public right-of-way, the cable operator will replace and restore such right-of-way to a condition reasonably comparable to the condition of the right-of-way prior to such disturbance;

- requirements that the cable operator raise, lower, temporarily disconnect, relocate or remove from the public right-of-way any property when required by the LFA by reason of traffic conditions, public safety, street abandonment, freeway or street construction, change or establishment of street grade, installation of sewers, drains, gas or water pipes, or other type of public structures or improvements;

- requirements that the cable operator, on request of any person holding a building moving permit issued by the LFA, raise, lower, temporarily disconnect, relocate or remove any property of the cable operator from the public right-of-way;

- requirements that the cable operator install its transmission and distribution facilities underground;

- requirements that the cable operator maintain adequate commercial general liability insurance, automobile liability insurance and workers' compensation insurance, naming the LFA as an additional insured;

- requirements that the cable operator maintain performance and construction bonds and letters of credit to ensure the faithful performance of obligations under the franchise, including requirements to upgrade the cable system, to pay franchise fees, and to meet the cable operator's indemnification obligations;

- requirements that the cable operator indemnify, save and hold harmless, and defend the LFA from and against any liability or claims for personal or property damage arising out of or in any way connected with the construction, maintenance and operation of the cable system; and

- requirements that the cable operator comply with the LFA's right-of-way construction permitting process, including paying all permit fees associated therewith.[97]

In addition to the express obligations contained in Cox's franchise agreements, those agreements also typically obligate the company to comply with all generally applicable local ordinances, including those relating to management of public rights-of-way. In short, to the extent an LFA has a legitimate concern over the use of public rights-of-way by a cable operator, those concerns can be and are addressed by the LFA in the cable franchise agreement and ordinances governing use of the rights-of-way. Consequently, LFAs' interest in physical management of the public rights-of-way is fully protected under their Title VI cable franchising authority, without the imposition of additional regulations on non-cable services such as cable modem service.

b. LFAs' Interest in Receiving Compensation for Public Rights-of Way Usage Is Fully Protected by the Cable Franchise.

Likewise, cable operators' provision of cable service franchise fees and other payments and benefits fully address LFAs' interest in receiving fair compensation for cable networks' use of public rights-of-way. The primary purpose of cable franchise fees is to compensate LFAs for use of public rights-of-way. There is little doubt that cable operators, of all rights-of-way users, are the most generous contributors to LFA franchise fee coffers. Most cable operators, for example, pay 5% of their gross cable services revenues (the federally authorized ceiling) for permission to use public rights-of-way to construct and operate a communications network. Many telecommunications service providers, by contrast, make far smaller (if any) payments for permission to use the public streets in precisely the same manner. Indeed, the actual amounts

[97] The requirements outlined above are representative of those included in Cox's cable franchise agreements. Many of its franchises contain additional obligations, whereas others do not impose all of the requirements listed above.

paid by cable operators in cable franchise fees pursuant to Section 622(b) are substantial. Cox alone paid over $150,500,000 in such fees last year to its LFAs.

Moreover, cable operators provide LFAs with a variety of payments and benefits in addition to the franchise fees paid on gross revenues from cable services. For example, LFAs typically require cable operators to pay fees and all costs associated with the grant, renewal, transfer and regulation of a cable franchise; numerous local taxes; fees for the use of any LFA-owned towers or other facilities; and all repairs, costs, insurance and indemnity associated with the cable operator's use of the public rights-of-way. None of these payments are included in the calculation of cable franchise fees. In addition, cable operators often provide PEG channels on their network for use by governmental and educational groups and the public; in-kind and financial support for PEG channels; and complimentary installations and service for schools, municipal buildings, etc. Cable operators generally also commit to extend and upgrade their systems to ensure that they remain "state of the art" and provide "universal service" throughout the cable franchise area. Apart from their cable franchise requirements, cable operators also provide other public benefits such as, for example, local employment, technology schools, and charitable contributions. Attachment A to these comments provides a list of examples of payments and benefits LFAs often demand from cable operators in addition to franchise fees on gross revenues from cable services.

The value of these non-fee benefits in some communities can be enormous. In one of Cox's large systems, for instance, the LFA requires Cox to set aside 18 PEG channels for LFA use. Using the Commission's very conservative leased access rate regulations, each one of these channels is worth at least $1 million per year, making the total channel set-aside worth a minimum of $18 million annually. In this same community, the LFA also requires Cox to pay

the LFA 3% of gross revenues each quarter in capital contributions for PEG access facilities and equipment, provide and pay for fiber connections and upstream transmission equipment between PEG access origination sites and Cox's head-end, interconnect with other systems for exchange of PEG signals, construct (at a partially reimbursed price) an institutional network ("INet") which Cox must maintain on its side of the demarcation point, provide free cable drops, converters and service to all designated government facilities, and pay various other fees. All of these payments are in addition to Cox's obligations to repair any damage to the rights-of way; pay rent for the use of LFA land on which antenna towers are located; grant the LFA various indemnity, insurance, performance bond, guarantees, liquidated damages, security deposit and security interest rights in the cable system; pay substantial real estate, personal property and business license taxes; and, of course, pay a 5% franchise fee on gross revenues from cable services. The approximate value of these combined benefits exceeds $30 million per annum. As this example demonstrates, LFAs receive ample compensation under cable franchise agreements for cable operators' use of public rights-of-way to construct and operate their franchised cable systems.

2. LFAs May Not Require Cable Operators to Obtain a Franchise to Provide an Interstate Information Service such as Cable Modem Service.

LFAs have no legal basis for requiring cable operators to obtain a separate franchise to provide cable modem service over their franchised cable systems. Section 624(a) specifies that "[a]ny franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."[98] As discussed above, nothing in

[98] 47 U.S.C. § 624(a); *see also* CI Cablevision of Oakland County, Inc; Petition for Declaratory Ruling, *Order on* Reconsideration, 13 FCC Rcd 16400 (1998) (*Troy Reconsideration Decision*).

Title VI allows state or local governments to regulate or restrict the provision of non-cable services over a cable system, particularly interstate information services such as cable modem service.

Congress drafted Title VI to "*define and limit* the authority that a franchising authority may exercise through the franchise process."[99] The boundaries of local governments' franchising authority, based on their rights to manage public rights-of-way, are delimited under Section 621(a)(2), dealing with cable operators' use of public rights-of-way to construct their network, and Section 622(b), dealing with cable operators' payment for such use. Section 621(a)(2) provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights of way . . .."[100] Under the plain language of Section 621(a)(2), a cable operator, having obtained a franchise to construct its cable system over public rights-of-way, is free to provide services over that cable system without having to obtain additional franchises from the LFA based on the latter's rights-of-way management authority. Consequently, the Commission is plainly correct in its tentative conclusion that, "once a cable operator has obtained a franchise for such a system, our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service."[101]

3. LFAs May Not Impose Franchise Fees on Cable Modem Service Gross Revenues.

Under the plain language of Title VI, an LFA cannot collect more than 5% of gross revenues from cable services for a cable operator's use of public rights-of-way for its network,

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[99] *See* H.R. REP. NO. 98-934 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655 (emphasis added).

[100] 47 U.S.C. § 541(a)(2).

[101] *Ruling & Notice*, FCC 02-77 at ¶ 102.

even when that network is used to provide non-cable services such as cable modem services. Section 622(b) explicitly limits local governments' authority to charge franchise fees to 5% of a cable operator's gross revenues derived "from the operation of the cable system to provide *cable services*."[102] The 1984 Cable Act originally permitted franchise fees in an amount not to exceed 5% of the gross revenues derived "from the operation of the cable system." The "cable services" limitation to Section 622(b) was adopted as part of the 1996 Act and was accepted in conference from the House bill. According to the House Conference Report, the limitation was intended to make clear that the franchise fees imposed by state and local authorities on cable operators must be limited to "only the operators' cable-related revenues."[103] It is thus clear that Congress intended to limit LFA-imposed franchise fees to gross revenues from the provision of cable services, and to exclude from that definition revenues from non-cable services such as cable modem service.

Congress plainly knew and contemplated that cable operators would use their networks (and LFAs' rights-of-way) to provide non-cable services. Nonetheless, Congress expressly limited franchise fees for the use of public rights-of-way to 5% of gross revenues from cable services. LFAs cannot exceed that limit merely because they want to increase their franchise fee revenues when cable operators offer cable modem service.

Consequently, as the Commission stated in the *Ruling & Notice*, because cable modem service is an interstate information service, "revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is

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[102] 47 U.S.C. § 542(b) (emphasis added).

[103] *See* H.R. CONF. REP. NO. 104-458 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 193.

determined."[104] The Commission's ruling that cable modem service is not a cable service automatically triggered the Section 622(b) prohibition against the assessment of cable franchise fees on non-cable services. Indeed, LFAs admitted, in their *NOI* comments, that a determination that cable modem service is not a cable service would mean that they cannot assess franchise fees on cable modem gross revenues.[105] The language of Section 622(b) – providing that the franchise fees imposed by the franchising authority "*shall not exceed*" the franchise fee ceiling – explicitly preempts any local rule or franchise provision that conflicts by purporting to impose a franchise fee on cable modem service. Nevertheless, cable operators have received hundreds of demands from LFAs for the continued collection and payment of franchise fees on cable modem service gross revenues. Accordingly, Cox requests that the Commission provide needed clarification by reiterating that Section 622(b) prohibits LFAs' assessment of franchise fees on gross revenues from cable modem services and other non-cable services.

As discussed above in Section VI(B)(1), this clarification would impose no hardship on LFAs, which already are amply compensated by cable operators for their use of public rights-of-way. There also is no merit to some LFAs' claim that the actual amount of franchise fees they collect will decline as cable operators roll out advanced, non-cable services over their upgraded cable networks. As an initial matter, many of the new services that cable operators are deploying are, in fact, Title VI cable services. The additional revenues generated by these services – which include such popular offerings as digital video and video-on-demand – will therefore be subject to the usual 5% cable service franchise fee. Accordingly, the current trend of increasing LFA

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[104] *Ruling & Notice*, FCC 02-77 at ¶ 105.

[105] National League of Cities, *et al.*, Comments in GN Docket No 00-185at 13 (filed Dec. 1, 2000).

franchise fee revenues from cable service gross revenues is likely to continue as operators deploy new services.[106] Moreover, in Cox's experience, a cable operator is likely to attract and retain more cable service subscribers when it offers new non-cable services such as high-speed Internet access and digital telephony.[107] Thus, LFAs actually enjoy an increase in the cable franchise fees they collect when cable operators begin offering advanced services, not a decrease as some have claimed.

Finally, the Commission correctly observed in the *Ruling & Notice* that the Internet Tax Freedom Act (the "ITFA") constitutes a further barrier to state and local fees on cable modem service.[108] The ITFA imposes a moratorium on state and local governments' imposition of any "taxes on Internet access" or "multiple or discriminatory taxes on electronic commerce."[109] Cable modem service qualifies as "Internet access," defined under the ITFA as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers."[110] Thus, the ITFA prohibits state and local governments from imposing any "taxes" on cable modem service.

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[106] For example, in a typical Cox Midwestern cable system, franchise fees on cable video gross revenues have grown approximately 6% annually over the last three years, even before full roll-out of digital services.

[107] *See, e.g., See* Press Release of Cox Communications, Inc., Cox Communications Surpasses Half Million Customers for Residential Digital Telephone Service (April 16, 2002), *available at* http://www.cox.com/pressroom (churn rate is approximately 33% lower for single-family homes subscribing to multiple services than for single-service customers).

[108] *Ruling & Notice*, FCC 02-77 at ¶ 105 (citing Internet Tax Freedom Act, 112 Stat. 261-719, 2681-724-726, 47 U.S.C. § 151 note).

[109] ITFA § 1101(a). This moratorium has been extended through November 1, 2003. Internet Tax Nondiscrimination Act, Pub. L. No. 107-75, 115 Stat. 703 (2001).

[110] ITFA § 1104(5).

The ITFA defines a "tax" to include "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes and is not a fee imposed for a specific privilege, services, or benefits conferred."[111] LFAs' own statements have made clear that franchise fees on cable modem services are imposed for the purpose of raising revenue for governmental purposes.[112] Moreover, because cable operators' existing cable franchises already authorize their use of the public rights-of-way, fees on cable modem service cannot be characterized as "fee[s] imposed for a specific privilege, services or benefits conferred." As noted above, no new privilege, service or benefit would be conferred in exchange for such additional fees.

Moreover, LFAs do not impose the same taxes on other providers of Internet access services, which contravenes the ITFA's separate moratorium on "multiple or discriminatory taxes on electronic commerce."[113] The ITFA defines "discriminatory taxes" as including any tax that "establishes a classification of Internet access service providers or online service providers for the purpose of establishing a higher tax rate to be imposed on such providers than the rate generally applied to providers of similar information services delivered through other means."[114] Because LFAs have been requiring franchising fee payments only from cable modem service providers, those payments constitute a discriminatory tax on electronic commerce under the ITFA.

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[111] ITFA § 1104(8)(A)(i).

[112] For example, the Alliance of Local Organizations Against Preemption recently stated that local authorities want the revenues from franchise fees on cable modem service "to fund budgeted local projects," including "costs in areas such as security following the September 11th attacks." May 14th, 2002 Press Release of ALOAP.

[113] 47 U.S.C. § 151 note.

[114] *Id.*

C. The FCC Should Expressly Preempt State And Local Regulation Of Cable Modem Service.

As discussed above, state and local governments have no regulatory authority over cable modem service because it is preempted by federal law. Accordingly, there is no need for the Commission to do anything other than confirm the absence of any such state or local authority. As a practical matter, however, all participants in the industry would benefit from clear federal guidance, and the Commission therefore should expressly preempt any state or local regulation of cable modem service. Moreover, even if state and local governments had retained any such authority, the Commission's statutory obligation to implement Congress' deregulatory national policy for Internet and broadband services would mandate preemption. The Commission therefore is entirely correct in observing that it must preempt "State and local regulations [that] limit[] the Commission's ability to achieve its national broadband policy goals to promote the deployment of advanced telecommunications capability to all Americans in a reasonable and timely manner, to promote the continued development of the Internet and other interactive computer services and other interactive media and to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[115]

As the Commission stated in the *Ruling & Notice*, "the courts have recognized the Commission's authority under Title I to pre-empt non-Federal regulations that negate the Commission's goals, including regulations affecting enhanced services."[116] Indeed, even in instances where Congress explicitly reserves regulatory authority for state and local

[115] *Ruling & Notice*, FCC 02-77 at ¶ 97 (citing 47 U.S.C. § 157 note, § 230(b)(1), (2)) (internal quotation marks omitted).

[116] *Id.* at ¶ 98 (citations omitted).

governments, the Commission has broad authority to preempt any such regulations that impinge on the Commission's ability to carry out its federal mandate. In *North Carolina Utilities Commission v. FCC*, for instance, the Fourth Circuit upheld the Commission's preemption of state regulation of CPE used jointly in interstate and intrastate communications.[117] The court ruled that the Section 2(b) reservation of state power to regulate common carriers' intrastate activities deprives the Commission of power over local services or facilities only where

> their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.[118]

The Fourth Circuit later reaffirmed its ruling, reasoning that, if it allowed conflicting state regulation of equipment used interchangeably for interstate and intrastate service, then "the FCC would necessarily be prevented from discharging its statutory duty under sections 1 and 2(a) to regulate interstate communication."[119] In this case, a prophylactic Commission preemption of state and local regulation of cable modem service is appropriate to protect national communications policy, given the Commission's determination that cable modem service is an interstate information service and the absence of any Congressional reservation of state or local authority over such services.

Indeed, Congress expressly recognized that intervention by any level of government into the provision of Internet–related services would unnecessarily stifle this vibrant and competitive

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[117] *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[118] *Id.* at 793.

[119] *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

marketplace.[120] Beyond implementing this national mandate, the Commission has identified in this proceeding its overarching principle that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[121] State or local regulation unavoidably would conflict with these national communications policy objectives.

Regulation of cable modem service by state or local authorities would result in hundreds, even thousands, of potentially conflicting regulatory schemes. For example, as discussed above, there are myriad technical, business and policy problems that inevitably would go hand-in-hand with government-mandated access to the cable modem platform. Allowing thousands of local authorities across the country to formulate their own schemes for addressing these issues would be disastrous to the future of cable modem service. The Commission rightly foresaw in the *Ruling & Notice* a "patchwork of State and local regulations" that could "result[] in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries."[122] The extraordinary burden of complying with such a patchwork of regulations could only slow the deployment of broadband services and substantially increase broadband's costs to consumers.

The adverse effects of local regulation on the development of cable modem service would be especially severe because the cable modem network infrastructure recognizes no local

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[120] 47 U.S.C. § 230.

[121] *Ruling & Notice*, FCC 02-77 at ¶¶ 5, 73 (footnote omitted). The Commission set as one of its primary objectives "how best to limit unnecessary and unduly burdensome regulatory costs." *Id.* at ¶ 5.

[122] *Id.* at ¶ 97.

or state boundaries. Local regulation is likely to impose conflicting obligations on cable operators who have designed and built their cable modem networks to maximize the benefits of clustering and other economies of scale and scope.[123] Consequently, cable operators may have to redesign and create entirely different physical networks and operational support systems to accommodate community-specific requirements. Retooling cable systems to satisfy a patchwork of disparate local rules would undermine the efficiency of the cable infrastructure, threaten disruption or even termination of service in many instances, and impose additional costs that would have to be passed on to consumers – all to the detriment of the American public and explicit congressional policy.

The dangers that disparate state and local regulations pose to the deployment of new services are familiar to the Commission. As the *Ruling & Notice* rightly observes, "the Commission has previously expressed concern about unnecessary regulation at the local level that extends far beyond local government interests in managing the public rights-of-way, and about the discriminatory application of regulation at the State and local levels."[124] For example, the Commission already has noted in the *Third Section 706 Report* that local rights-of-way regulations may be hindering the deployment of broadband services.[125] The Commission foresaw this threat in the *Troy Decision* and admonished LFAs that "administration of the public rights-of-way should not be used to undermine the efforts of either cable or telecommunications providers to either upgrade or build new facilities to provide a broad array of new

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[123] For example, cable systems serving many different local franchising areas may share the same provisioning and customer support systems, backbone, data centers, domain name system ("DNS") servers, Dynamic Host Configuration Protocol ("DHCP") servers, etc.

[124] *Id.* at ¶ 104 (footnotes omitted).

[125] *Third Section 706 Report*, FCC 02-33 at ¶¶ 167-68.

communications services."[126] Yet, despite this express admonishment and the clear deregulatory implications of the Commission's recent cable modem service classification decision, numerous LFAs have stated their intent to prevent cable operators from providing cable modem service if the cable operators do not obtain a separate franchise, pay additional franchise fees or agree to access and other regulations on the service.

These LFA demands are but further evidence of the need for federal preemption here – the propriety of which the courts clearly would bless. In fact, the courts have expressly recognized the importance of Commission preemption of state and local regulation in order to further a deregulatory national policy. In *New York State Commission on Cable Television v. FCC*, the Second Circuit upheld the Commission's preemption of state regulation of the reception of multipoint distribution system ("MDS") signals over multiple antenna television ("MATV") systems, although the Commission did not impose its own regulations on MATV systems used to distribute MDS signals.[127] "Federal regulation," the court stated, "need not be heavy-handed in order to preempt state regulation."[128] In a similar case, the D.C. Circuit explicitly rejected the contention that the Commission could not preempt state and local regulation in order to allow satellite master antenna television ("SMATV") services to enter the marketplace unregulated.[129] Thus, the Commission may preempt state and local regulation that

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[126] *Troy Decision*, 12 FCC Rcd at 21429 ("Upgrades of existing copper and coaxial cable plant . . . are essential for the future provision of switched, integrated broadband voice, video and data services.").

[127] *NY State Comm'n on Cable Television*, 669 F.2d at 65-66.

[128] *Id.* at 66.

[129] *NY State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 807 (D.C. Cir. 1984) (upholding the Commission's decision to preempt state and local regulation of SMATV that has "the effect of interfering with, delaying, or terminating interstate and federally controlled communications services").

conflicts with federal regulatory objectives, even when those objectives are best served by an absence of regulations.

In this case, there is no lawful basis for state and local regulation of cable modem service, an interstate information service. State and local attempts to assert such authority would directly threaten to the national policy goals of Congress and the Commission to preserve the Internet unfettered from regulation and to allow broadband services to flourish in a minimal regulatory environment that promotes investment and innovation. As the Supreme Court recently observed in finding that the imposition of additional burdens on cable modem service would be contrary to national communications policy, "Congress' general instruction to the FCC [is] to 'encourage the deployment of' broadband Internet capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.'"[130] Yet state and local regulation of cable modem service would erect precisely such barriers to broadband infrastructure investment and deployment. The Commission accordingly should confirm the absence of state and local authority over cable modem services. And, to avoid unnecessary disputes regarding the need for express preemption, the Commission also should exercise its preemption powers explicitly to preclude any renegade efforts by state or local governments to regulate these services.

VII. THE COMMISSION SHOULD EXERCISE ITS JURISDICTION TO RESOLVE CABLE MODEM FRANCHISE FEE REFUND DISPUTES.

The Commission's ruling that cable modem service is not a cable service resolved the issue of future franchise fee payments on the service – conclusively eliminating any basis for such fees going forward – but also raised a question regarding the fees previously collected

[130] *National Cable & Telecommunications Association, Inc. v. Gulf Power*, 122 S. Ct. 782, 789 (2002) ("*Gulf Power*").